

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANGEL RIVERA,
Petitioner,

v.

CIVIL ACTION NO.
05-10629-JLT

JOHN ASHCROFT,
Attorney General,
Respondent.

ORDER RE:
MOTION FOR APPOINTMENT OF COUNSEL
(DOCKET ENTRY # 3)

May 3, 2005

BOWLER, U.S.M.J.

Petitioner Angel Rivera ("petitioner") moves for appointment of counsel. (Docket Entry # 3). Petitioner paid the filing fee and is not proceeding in forma pauperis. Hence, the provisions of 28 U.S.C. § 1915(e) which, by its heading govern "Proceedings in forma pauperis," do not apply.

Section 3006A of Title 18 of the United States Code allows for appointment of counsel where the "interests of justice so require" and the person is "financially eligible" and seeking relief under section 2254. 18 U.S.C. § 3006A(2)(B); see Battle v. Armontrout, 902 F.2d 701, 702 (8th Cir. 1990) ("court may appoint counsel for any financially eligible person seeking relief under section 2254 when the interests of justice so require"). Unless the court conducts an evidentiary hearing,

however, such an appointment is discretionary. See Heath v. United States Parole Commission, 788 F.2d 85, 88 (2d Cir. 1986) (noting discretionary nature of appointment); see also Abdullah v. Norris, 18 F.3d 571, 573 (8th Cir. 1994) (if "court conducts an evidentiary hearing on the petition the interests of justice require that the court appoint counsel").

The rare cases warranting appointment of counsel in the interests of justice typically involve nonfrivolous claims with factually and/or legally complex issues and a petitioner who is severely hampered in his ability to investigate the facts. See United States v. Mala, 7 F.3d 1058, 1063-1064 (1st Cir. 1993) (discussing application of section 3006A(a)(2) to section 2255 motion, noting coalescence of the three aforementioned circumstances, and citing Battle v. Armontrout, 902 F.2d at 702, a section 2254 case); Battle v. Armontrout, 902 F.2d at 702 (remanding section 2254 petition for appointment of counsel where claim was nonfrivolous, facts and law were complex and the petitioner's incarceration severely hampered his ability to investigate); see also Abdullah v. Norris, 18 F.3d at 573 (where the petitioner presents nonfrivolous claim, court should consider legal and factual complexity of case and the petitioner's ability to investigate in determining appointment of counsel under section 3006A(a)(2)).

At this preliminary stage, the issues, which primarily involve statute of limitations issues, are not complex.

Petitioner may reapply for appointment in the event this court conducts an evidentiary hearing and/or the case proceeds to a more complex stage involving nonfrivolous claims.

Also pending before this court is a motion to amend the petition and substitute Michael A. Thompson ("Thompson") as respondent filed by respondent John Ashcroft.¹ (Docket Entry # 6). The proper person to name as respondent in a habeas petition filed under 28 U.S.C. § 2254 is typically "the warden of the institution in which the petitioner is incarcerated." Rule 2(a), 28 U.S.C. foll. § 2254, Advisory Committee Notes. Respondent is correct insofar as he is undeniably not the proper party. See Rule 2(a), 28 U.S.C. foll. § 2254. That said, respondent identifies Thompson as Superintendent of "M.C.I.-Shirley" whereas petitioner represents his place of confinement as the "Plymouth House of Corrections" in Plymouth, Massachusetts. Respondent is therefore directed to provide additional information relative to petitioner's custodian and the proper party on or before May 20, 2005.

CONCLUSION

The motion for appointment of counsel (Docket Entry # 3) is **DENIED** without prejudice. Respondent is directed to provide the

¹ This court takes judicial notice that Alberto R. Gonzales became the Attorney General of the United States on February 5, 2005.

aforementioned additional information relative to the proper party on or before May 20, 2005.

/s/ Marianne B. Bowler

MARIANNE B. BOWLER

United States Magistrate Judge